

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 19

LINCOLN CITY, LLC, d/b/a LINCOLN CITY  
REHABILITATION CENTER<sup>1</sup>

Employer

and

Case 36-RC-6327

SERVICE EMPLOYEES INTERNATIONAL  
UNION, LOCAL 503

Petitioner

**DECISION AND DIRECTION OF ELECTION**

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board. Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned. Upon the entire record<sup>2</sup> in this proceeding, the undersigned makes the following findings and conclusions.<sup>3</sup>

**SUMMARY**

The Employer<sup>4</sup> is engaged in the business of providing nursing care to seniors and people with disabilities in Lincoln City, Oregon ("Facility"). The Petitioner seeks a unit of all full-time, regular part-time and per-diem<sup>5</sup> employees employed solely by the Employer at the Facility, including but not limited to all certified nursing assistants, nursing assistants, certified med aids, physical therapy aids, and all non-supervisory employees in dietary, housekeeping, laundry, medical records,<sup>6</sup> and maintenance employees employed at the Employer's Facility.

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<sup>1</sup> The Employer's name appears as amended at the hearing.

<sup>2</sup> Both parties timely submitted briefs, which were carefully considered.

<sup>3</sup> The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein. The labor organization involved claims to represent certain employees of the Employer and a question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

<sup>4</sup> During the hearing, the parties stipulated that the Employer is a health care institution within the meaning of Section 2(14) of the Act.

<sup>5</sup> Petitioner seeks per diem employees "who meet the average of 4 hours per week in a calendar quarter test."

<sup>6</sup> The Petitioner initially sought to include medical records employees. During the hearing, the parties stipulated to exclude this position as the only identified medical records person was the medical records director, a stipulated statutory supervisor.

There are four issues in dispute. First, the Employer argues that the single facility unit which Petitioner seeks is not appropriate because the unit should include at a minimum 6 of the Employer's facilities, one of which would be the Lincoln City Facility. Second, the Employer contends that the appropriate unit must comprise a joint employer unit rather than a single employer unit. Third, it contends that there is an inherent conflict of interest as Petitioner currently represents surveyors employed by the State of Oregon and is seeking to represent a unit of employees who have been or probably could be the subject of surveys conducted by the surveyors. Fourth, the Employer claims that it was denied administrative due process because the commencement of the hearing was not rescheduled to accommodate the Employer's desire to present evidence at the hearing through Pinnacle's Human Resource Director, John Kostenbauer.

Based on the following facts and legal analysis, I find that the single facility unit sought by Petitioner is an appropriate unit and that the Employer's joint employer argument fails. Further, I find that the surveyors at issue do not present a disabling conflict of interest with the members of the petitioned for unit. Finally, I find that the Employer's claim of a denial of due process lacks merit.

Below, I have set forth the background information on the Employer's operations and the evidence and legal analysis for each issue as revealed by the record in this matter. Following the evidence and legal analysis for each issue, is my conclusion and direction of election.

## **I. BACKGROUND**

The Employer is engaged in the operation of providing nursing care to seniors and people with disabilities, with a focus on therapy and rehabilitation. The Employer also provides wound care management, IV therapies, respite care (care for residents admitted into the facility for a period of time extending beyond 24 hours and normally less than 14 days), and hospice care (end of life care). The Facility, which is regulated by the State and Federal Government, operates 24 hours a day, 7 days a week.

The Employer is a wholly owned subsidiary of Pinnacle Healthcare, Inc. ("Pinnacle"), located in Springfield, Oregon, which owns and operates eight other care centers in Oregon and one in Arizona. The Facility is comprised of the following departments: nursing, dietary (meals for the residents that are prepared on site), environmental (housekeeping, laundry and maintenance), and rehabilitation (physical therapy and occupational therapy). The Administrator for the Facility, Theresa Mae Rhoades,<sup>7</sup> oversees the entire Facility, including consultants, the office manager, Social Services/Admissions Coordinator, Activity Director, the medical records person, and the various department managers.

## **II. THE FOUR ISSUES**

### **A. THE MULTIFACILITY ISSUE**

#### **1. Parties' Positions**

The Employer argues that the petitioned for single facility unit is inappropriate, and instead, the unit should include at a minimum, six of Pinnacle's facilities, one of which would be the Employer's Facility. The Petitioner seeks to represent only those employees employed by the Employer at the Facility.

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Rhoades was the only witness who testified at the hearing.

## **2. Evidence**

At the Employer's Facility, residents receive nursing care, which entails following physicians' orders in regards to medications, treatments and the care of the resident, and meeting their dietary needs and other restrictions. Residents also receive care with respect to cleanliness, including bathing and dressing. The Employer offers overnight accommodations, food service, daily activities, and various therapies to the extent indicated. According to Rhoades, job descriptions covering the various classifications of employees at the Facility are the same at other Pinnacle facilities. Pinnacle's other facilities provide essentially the same services as the Facility.

### **a) Central Control Over Operations and Labor Relations**

In addition to the Employer's Facility, the Employer argues the following other facilities comprise the smallest appropriate unit for the purpose of collective bargaining: Corvallis Manor Nursing & Rehabilitation Center, French Prairie Care Center, Green Valley Rehabilitation Health Center, Hillside Heights Rehabilitation Center, and South Hills Rehabilitation Center. These six facilities, located in Oregon, are administered by Regional Administrator Lee Garber, who works out of Pinnacle's office in Springfield. Pinnacle also owns three other facilities comprising a separate region in Oregon under a different regional administrator<sup>8</sup> and a tenth facility in Arizona, which is administered by a different administrator.<sup>9</sup> John Kostenbauer is Director of Human Resources at Pinnacle for all ten facilities. There is no on-site human resources person at the Employer's facility.

There is frequent and regular interaction between Administrator Rhoades and Regional Administrator Garber.<sup>10</sup> Rhoades communicates with Garber on a daily basis by telephone, in person, and by e-mail.<sup>11</sup> In turn, Garber visits the Facility an average about once a week. If Rhoades is unavailable, the director of nursing contacts Garber in emergency situations.

According to the Employer, there is frequent contact with individuals at the parent company, Pinnacle. The Employer's office manager and his assistant often talk with Pinnacle's human resources director. However, the Employer did not provide details on the frequency, duration or substance of these conversations. The Pinnacle accounts receivable person contacts the Employer's rehabilitation manager regarding units for billing as well as the office manager for bank deposits. The Employer's director of food services has regular contact with Pinnacle's dietitian. Pinnacle's nurse consultant contacts the Employer's director of nursing, Resident Care Managers (RCMs) or rehab therapists in the event of quality assurance issues for the Facility. The Employer's rehab therapists also contact the person in charge of the Medicare portion for billing at Pinnacle (about once a month or more).

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<sup>8</sup> Rhoades testified that COO Steve Wallace was possibly the regional administrator for the three facilities in this Oregon region.

<sup>9</sup> The individual holding this position was not identified in the record.

<sup>10</sup> Rhoades had a three-year stint as the administrator at the Facility (from October 2000 to October 2003). She left to fill two other positions at other employers for a period of approximately two years. About two months before the hearing, Rhoades returned to the Facility as Administrator. She has about 18 years of experience in nursing home or nursing facility administration.

<sup>11</sup> Rhoades consults with Garber about financial performance, quality of care for residents, compliance with various governmental regulations, and general supervision and direction.

The accounts payable and accounts receivable are handled centrally (at Pinnacle), including bills to residents. Any invoices received at the Facility are sent overnight to Pinnacle for processing. Some invoices are sent directly to Pinnacle from vendors. Additionally, medical records are kept at Pinnacle by the medical records director.

With regard to supplies, the Employer receives medical supplies directly from third party suppliers. However, Pinnacle negotiates and enters into contracts with these suppliers. It then provides the Employer with a list of vendors from which to purchase supplies, along with a budget. The Employer receives office supplies and stationery from Pinnacle, with "Lincoln City Rehabilitation Center" listed as the employer on the stationery.<sup>12</sup>

There is limited evidence of common management of the region's six facilities.<sup>13</sup> Rhoades does not have any duties with regard to any of the other Pinnacle facilities. Moreover, department managers<sup>14</sup> at the Facility do not have the authority to go to another facility and manage employees there. Rather, they oversee personnel in their respective departments in the Facility only.

With respect to hiring, Facility managers do hiring for their respective departments with Rhoades' involvement. Rhoades has authority to hire employees and determine wages upon hire without consulting with Kostenbauer or Garber.

Although Kostenbauer does firing almost exclusively, the record contains no specificity regarding prior terminations. There was one isolated instance in which Rhoades participated in firing (of a director of nursing). In that instance, however, she consulted with Kostenbauer and Garber.

Facility department managers also initiate and handle discipline of staff in their respective departments, including counseling, issuing a written warning and sending employees home. If a situation continues to be a problem, the managers do not have

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<sup>12</sup> Later in the record, Rhoades testified that the payor name on the top of the paychecks for herself as well as for all other Facility employees is Lincoln City Rehabilitation Center, and not the parent company, Pinnacle. She did not know whether this was true of Regional Administrator Garber's paychecks.

<sup>13</sup> A Pinnacle registered dietitian consults with other facilities in addition to the Employer's facility. This registered dietitian has no role in determining wages, hours and working conditions of employees in the dietary department at the Employer's Facility. This person prepares menus, reviews diet orders, nutritional intake of residents, nutrition at risk residents and sanitation of the kitchen.

<sup>14</sup> The parties stipulated to exclude the office manager, the resident care managers, charge nurses, the rehabilitation department manager, the food service director, the environmental services director, the housekeeping supervisor, the medical records director, the social services director, the activities director, and staffing coordinator/central supply person, on the basis that these individuals possess indicia of supervisory authority as that term is defined in Section 2(11) of the Act. In view of the parties' stipulation and the record in this case, I shall exclude the above positions from the unit with the exception of the staffing coordinator/central supply person.

With regard to the staffing coordinator/central supply person, the Employer argues that this person is a statutory supervisor and confidential employee, and contends that s/he should be excluded from the unit on this basis. Petitioner, however, was not prepared to take a position on the precise factual basis on which the Employer asserted this contention. Based on my reading of the record, the evidence is inconclusive in determining the status of the staffing coordinator/central supply person. I shall therefore allow the staffing coordinator/central supply person to vote subject to challenge.

authority to issue further discipline and instead would bring the matter to Rhoades' attention. If the situation appeared more complicated, Rhoades would then consult with Kostenbauer and Regional Administrator Garber, e.g., if the matter involved assessing whether an employee is in need of accommodations or is being intentionally negligent in his/her duties, etc.

Rhoades testified that she has attended meetings in Springfield, Oregon with other facilities' administrators more than ten times in the last five years. In the last 2 months, she has attended two meetings--one regarding financial reviews for the Facility, involving a "group of corporate personnel" and the second being a general meeting for all administrators and directors of nurses from the facilities about their respective marketing and financial performances and about some policy procedure reviews.<sup>15</sup> I note that Rhoades testified that she did not know the names of the administrators at the other facilities in the region.

#### **b) Interchange, Interaction and Integration**

All Pinnacle facilities are stand alone facilities. The record reveals that the Employer's Facility is not dependent for the provision of any services or materials on any other facility within Pinnacle's two regions. There is no need to transfer residents or supplies from one Pinnacle facility to another. The record reveals no evidence of any transfer of residents from any other Pinnacle facility to the Employer's Facility. Additionally, Facility employees and supervisors generally do not visit other Pinnacle facilities. There was one occasion (in 2000) when Rhoades picked up supplies (i.e., disposable incontinent briefs) at the Corvallis Manor facility, but according to Rhoades, that was not usual operating procedure at the time. Indeed, in the event of a shutdown of other Pinnacle facilities, there would likely be no adverse affect on the Employer's ability to continue to provide care to the residents at the Facility. Likewise, if the Employer's Facility shut down its operation, Rhoades testified that the other Pinnacle facilities would probably continue with their regular business.

The record demonstrates little or no interchange or interaction of employees between Pinnacle facilities.<sup>16</sup> Rhoades recalls that a CNA (charge nurse assistant) from another facility came to help out at the Facility at some point when Rhoades worked for the Employer from 2000-2003, but did not recall any specifics (e.g., duration and extent of such help). With regard to the therapy department, when the Employer's census is low, therapy aides are offered the opportunity to go and work in another Pinnacle facility to pick up additional shifts. The Employer presented no further details regarding the therapy aides' work at other facilities.

There is meager evidence of permanent or temporary transfers between the Employer's Facility and other Pinnacle facilities. Rhoades' testified that she had knowledge of cases where Pinnacle employees have worked at more than one facility owned and operated by Pinnacle and cases where employees working at the Employer's Facility have either come

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<sup>15</sup> Some policies reviewed at that meeting included Agency building use. Rhoades did not recall the other policies discussed and/or reviewed.

<sup>16</sup> Although not an interchange of employees between facilities, it appears a physical therapist and occupational therapist -- positions excluded from the unit by the parties -- are available to all of Pinnacles' facilities. The availability of these therapists is coordinated by Pinnacle's corporate headquarters. Rhoades had no knowledge of the details surrounding the extent of interchange involving these non-unit therapists. Additionally, one physical therapist was shared on an on-going basis with another facility, but the Employer provided no further details in this regard. The record also reveals that Pinnacle consultants consult with all Pinnacle facilities in the region.

from or gone to other facilities, but provided no further details. She had no knowledge of whether there has been an employee shared between facilities.<sup>17</sup> Moreover, Rhoades was unaware of any written policies or procedures that provide for the loaning or sharing of employees between facilities. As for permanent transfers, Rhoades stated she did not recall any employees being hired at one facility and then permanently transferred to another.

**c) Similarity of Skills, Functions, and Working Conditions**

The Employer contends that all Oregon facilities employ the same job descriptions and all are also subject to the same “agency” book that outlines different policies and responsibilities.<sup>18</sup> Rhoades stated she believes the Facility employee handbook is also the same as that used at all other facilities and that there is no separate handbook or personnel policy for only the Employer’s Facility.<sup>19</sup> She bases this knowledge on the handbook cover which says “Pinnacle Healthcare” and which comes directly from Kostenbauer. She testified she was also told it was the same handbook for each facility, yet did not identify the person who “told” her this information.

Rhoades testified that the medical benefit plan package and retirement plan were the same at all facilities. With regard to the corporate benefit plan package, Rhoades initially testified that it was the same at all facilities, but later testified that she had no idea how this package compared to other facilities. The Employer provides paid holidays and paid time off benefits to both its full-time and part-time employees. Although Rhoades asserted that the same was true at the other facilities, the Employer provided no other evidence of actual holidays and other benefits for other facilities’ employees.

Each department at the Employer’s Facility has different shifts and schedules that are set by the respective department managers. Employees use time clocks to record their hours. The office manager can make adjustments on the time clock for various functions (with a time clock adjustment slip, which employees fill out).<sup>20</sup> The employees’ hours are then transmitted to the corporate office (Pinnacle), which manages payroll through a single corporate-wide payroll function. The Employer does not handle payroll at the Facility and paychecks are not issued through its Facility.<sup>21</sup>

Once hired, the employees at the Employer’s Facility attend orientation at the Employer’s Facility and additional orientation within their respective departments. Pinnacle is not involved in these orientation sessions.

With respect to evaluations, employees at the Facility are reviewed at any point in time,

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<sup>17</sup> Rhoades was only aware of one instance in which a CNA from French Prairie came to work at the Facility during Rhoades’ earlier employment at the Employer. However, Rhoades could provide no further details. Although Rhoades believed that Pinnacle has documents regarding the extent or number of occasions that employees from the Employer’s Facility have worked at other facilities owned by Pinnacle, the Employer made no such documents available at the hearing.

<sup>18</sup> Rhoades testified that she had no specific evidence about the job descriptions for the facility in Arizona.

<sup>19</sup> These handbooks are handed out to employees upon hiring at the Facility.

<sup>20</sup> Any further adjustments would be made by the payroll department at Pinnacle.

<sup>21</sup> Rhoades testified that she has no authority to change the pay system and install incentive pay programs or otherwise modify the compensation system at the Facility, and would have to contact Lee Garber for any deviation in this regard.

usually once every year or 18 months. Evaluations are completed at the Facility by directors, charges nurses, etc., without participation from Pinnacle. Rhoades reviews these evaluations, signs off on them, and passes them along to Pinnacle, where they go into employees' personnel files. No further input and/or signature from Pinnacle is required on the evaluation itself. However, in the event of a recommendation for a wage increase,<sup>22</sup> Rhoades might consult with Pinnacle.<sup>23</sup>

**d) Absence of Bargaining History**

There is no bargaining history at the Employer and no evidence of bargaining history at any of the other Pinnacle facilities in the record.

**e) Geographic Proximity**

Based on the Employer's Exhibit 1 and review<sup>24</sup> of approximate distances between the Facility and the other five facilities in the Employer's proposed unit, it appears that the closest facility to Lincoln City is about 74 miles from the Facility and that the farthest facility is about 122 miles away.<sup>25</sup>

**3. Legal Analysis Regarding the Multifacility Issue**

The Board has long held that a single facility unit in the health care industry is presumptively appropriate, unless it has been so effectively merged into a more comprehensive unit, or is so functionally integrated, that it has lost its separate identity. *Catholic Healthcare West d/b/a Mercy Sacramento Hospital*, 344 NLRB No. 93, Slip. Op. at 1 (2005) (citations omitted). As the party opposing the single facility unit, the Employer has the heavy burden of overcoming [this] presumption. *Id.* (citing *Trane*, 339 NLRB 866 (2003)). In order to rebut the presumption, the Employer must demonstrate integration so substantial as to negate the separate identity of the single facility. *Id.* (citing *Heritage Park Health Care Center*, 324 NLRB 447, 451 (1997), *enfd.* 159 F.3d 1346 (2d Cir. 1998)). To determine whether the single facility presumption has been rebutted, the Board examines such factors as geographic proximity, employee interchange and transfer, functional integration, administrative centralization, common supervision, and bargaining history, if any. *Id.*; *Rental Uniform Service*, 330 NLRB 334, 335 (1999). In view of the above, I find that the Employer has not rebutted the single facility presumption.

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<sup>22</sup> The evaluation does not necessarily generate or determine a wage increase.

<sup>23</sup> Rhoades has authority to grant wage increases up to 3% per a standard wage scale, as well as Garber and Kostenbauer. Anything more than a 3% wage increase would require approval from Pinnacle. The wage scale is specific to the Facility. Rhoades had no knowledge about other facilities' wage scales.

<sup>24</sup> These distances are based on the Oregon Department of Transportation's ("ODOT") mileage table posted at [http://egov.oregon.gov/ODOT/TD/asset\\_mgmt/docs/OTMS/MileageChart.pdf](http://egov.oregon.gov/ODOT/TD/asset_mgmt/docs/OTMS/MileageChart.pdf), of which I take administrative notice.

<sup>25</sup> The mileage table reports that Corvallis, where Corvallis Manor Nursing & Rehabilitation Center is located, is about 74 miles from Lincoln City. French Prairie Care Center, in Woodburn, is about 76 miles from the Facility. Eugene, where three of the five other Pinnacle facilities in the Employer's region are located (Green Valley Rehabilitation Health Center, Hillside Heights Rehabilitation Center, and South Hills Rehabilitation Center), is about 122 miles from Lincoln City. I note that few if any, of these miles are freeway miles.

**a) Interchange, Interaction and Integration**

The Employer has failed to demonstrate that the six Oregon facilities in the Employer's region operate as a single network and are functionally integrated both as to the services provided and as to the employees who provide them. First, there is insufficient evidence of any transfer of employees, whether temporary or permanent, save for one vague instance which is unsupported by the record. Although Administrator Rhoades testified that therapy aides are offered the opportunity to go and work in another facility to pick up additional shifts when the need arises, she provided no details of actual instances where this occurred, or any supporting evidence in that regard. Even if temporary transfers did occur, "they are the exception rather than the norm," as the Board noted in finding that the employer's interchange evidence did not support its failed attempt to rebut the single facility presumption in *Catholic Healthcare West*, 344 NLRB No. 93, Slip. Op. at 2. Indeed, the Board considers the degree of interchange and separate supervision to be of particular importance in determining whether the single facility presumption has been rebutted. *Id.* at 1 (citing *Passavant Retirement & Health Center*, 313 NLRB 1216, 1218 (1994)); *Executive Resources Associates*, 301 NLRB 400, 401 (1991).

Next, each facility provides its own services to residents and uses its own materials obtained from third party suppliers. The residents do not transfer from facility to facility. The employees at the Facility are not even in regular contact with the employees at the other facilities during the workday.<sup>26</sup> The record further discloses that the facilities do not engage in daily work-related interaction by phone or electronic mail. The Employer contends that the facilities in the Employer's region are functionally integrated because they all utilize common consultants and dietitians. However, the evidence demonstrates that these individuals are employed by Pinnacle, and are not necessarily employees employed by any of the other facilities. Accordingly, there is insufficient evidence of significant functional integration between the facilities.

The Employer cites to *Kaiser Foundation Health Plan of Oregon*, 225 NLRB 409 (1976) in support of its multifacility argument. In *Kaiser Foundation Health Plan*, the Board found that a unit of all professional employees at the employer's hospital and other clinics should be included in a unit with psychotherapists at the employer's mental health clinic). *Id.* In so holding, the Board considered the employer's highly integrated operation of its overall health facilities, the centralized control of labor relations, and the similarities in duties among unit employees. This case is distinguishable from *Kaiser Foundation Health Plan* because there is little or no evidence of functional integration between the Pinnacle facilities and as discussed below, there is substantially more local autonomy at the Employer's Facility than the employer in *Kaiser*. Accordingly, the Employer's reliance on *Kaiser Foundation Health Plan of Oregon* bears little weight on my decision with regard to the appropriateness of a single facility unit.

**b) Central Control Over Operations and Labor Relations**

The Employer contends that the multifacility unit is appropriate because of centralization of operations and labor relations. However, it is settled that centralization of operations and labor relations alone is insufficient to rebut the presumptive appropriateness of a single facility

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<sup>26</sup> Although the administrators at the various facilities have met on average twice a year to discuss matters like policies and finances, there is no evidence of regular contact with matters related to the operations of the facilities. Indeed, Rhoades could not recall the names of the other facilities' administrators.

unit where there is evidence of significant local autonomy. See *New Britain Transportation Co.*, 330 NLRB 397 (1999). Concededly, Pinnacle operates on a centralized basis with respect to payroll functions, billing, and contracting for the provision of supplies. However, each facility, including the Employer's Facility, has its own administrator and office manager. The Employer's administrator and department managers have significant autonomy with regard to hiring, discipline, evaluations, limited wage increases, new employee orientations and scheduling. Only in matters involving significant pay raises or complex disciplinary issues up to termination is Administrator Rhoades required to consult with Pinnacle's HR department and/or Regional Administrator Garber. In all of these respects, the autonomy retained by the Employer is substantially equivalent to that which was retained by the single facility that was considered in *Catholic Healthcare West*, where the Board concluded that the employer had failed to rebut the single facility presumption. 344 NLRB No. 93, Slip. Op. at 2 and 3.

The Employer also argues that the frequency and nature of the contacts between the Facility and Pinnacle reflect strong central control over operations and labor relations. However, the Employer failed to elaborate on the frequency, duration, and nature of the bulk of these contacts. To the extent the nature of contacts with Pinnacle staff and managers was identified, the record shows that they related to billing, bank deposits, and quality assurance issues for the Facility and not necessarily labor relations. Moreover, for the purpose of rebutting the single facility presumption, only contacts between *unit* employees at different facilities matter. See *Catholic Healthcare West*. 344 NLRB No. 93, Slip. Op. at 3. There is no evidence that unit employees have contact with their counterparts at other Pinnacle facilities sufficient to rebut the single facility presumption.

Furthermore, each Facility manager has duties at the Facility only. If an employee has a payroll issue, s/he must contact the Employer's office manager for any adjustments. Each employee's paycheck (including Administrator Rhoades' paycheck) bears the Employer's name, not Pinnacle's. In sum, the authority of the administrator and department managers evinces significant local autonomy even though the Employer's higher-ranking management officials retain final authority over certain other matters (i.e., terminations). See *Rental Uniform Service*, 330 NLRB 334, 335-336 (1999); *Executive Resources Associates*, 301 NLRB 400, 402 (1991); see also *Renzetti's Market*, 238 NLRB 174, 175-176 (1978) (emphasizing local supervision).

The Employer's case cites relating to this issue of central control over operations and labor relations are clearly distinguishable. Although the Board in *Waste Management Inc.*, 331 NLRB 309 (2000) did find the single facility presumption rebutted, the facts for finding such were significantly different than the facts herein. In *Waste Management*, the petitioner sought a unit of all drivers and yard and sales employees at only one facility. In adding another facility, the Board found that the same supervisors, on a daily basis, supervised employees of both locations inasmuch as the employer had no on-site supervisor at one of the facilities. Moreover, all employees were continuously in contact by radio with the one office and each other. In both *R & D Trucking*, 327 NLRB 532 (1999) and *Twenty-First Century Restaurant*, 199 NLRB 881 (1971) the Board found significant interchange of employees and lack of local autonomy, factors not present here. As in *Waste Management*, *R & D Trucking* had no supervisor at the second location. The President supervised all of the employees at both locations, and did all of the hiring, firing, disciplining, assigning of work, and the setting of wages, and working conditions. Additionally, there was substantial interchange of employees. Similarly, in *Twenty-First Century Restaurant* there was substantial interchange of employees between the seven New York franchised food outlets and the General Manager and/or field supervisors of the division (not the on-site manager), were responsible for setting uniform hours, preparing the labor schedule formula which determined the crew size working at each location each day, reviewing employee

time cards, approving all hires above the state minimum wage, discharging permanent employees, approving employee requests for leaves of absence and for determining all wage increases, promotions and transfers of employees between locations. Additionally, the on-site manager had no authority to hire, fire, discipline or evaluate assistant managers. As noted above, the Board considers the degree of interchange and separate supervision to be of particular importance in determining whether the single facility presumption has been rebutted.

**c) Similarity of Skills, Functions, and Working Conditions**

The Employer's contention that there is little distinction between the employees at the Facility and employees at other Pinnacle facilities is problematic. Generally speaking, the employees at the Facility all engage in nursing and other services, but the Employer provided no evidence detailing the hours, shifts, wages, holidays, employee handbooks, fringe benefits, job skills and/or duties at the other facilities. Although other facilities presumably transmit hours for payroll in the same fashion (e.g. to Pinnacle), the Employer provided no evidence of whether the same shifts, schedules, and hours were observed at the other facilities.

Further, there is no evidence of any region-wide orientation, sharing of supplies, or interchange of services. As discussed above, the Employer in fact does not regularly interchange employees between different facilities. See *Rental Uniform Service*, 330 NLRB at 336 (finding that unit employees maintained separate identity, despite similarity of skills, pay, and job function with other employees, where there was no interchange or interaction between the groups).

Moreover, the employees are separately supervised, they receive their work assignments from department managers at their respective facilities, and they report for work and clock-in at their respective facilities. In sum, although the employees at the various facilities are likely all performing the same general work, the Employer's employees remain easily identifiable as a separate and distinct group of employees.

The Employer's reliance on *Kaiser Foundation Hospitals, Inc.*, 219 NLRB 325 (1975) in arguing for a multi-facility unit is misplaced. In *Kaiser Foundation Hospitals*, the Board found that an appropriate unit including the petitioned for pharmacists, must also include all other non-represented professional employees of the employer in Hawaii because there was a "commonality of professionalism," such as qualifications, training, comparable wages, and schedules. *Id.* Unlike the instant case, the petitioned-for unit in that case included pharmacists in a multi-facility unit (three other outpatient clinics on the island of Oahu). *Id.* at 325. The single facility presumption does not apply when a party stipulates at the outset that a multi-facility unit is appropriate. *Stormont-Vail Healthcare, Inc.*, 340 NLRB No. 143 (2003).

Moreover, in arguing that a broader unit is appropriate, the Employer cites to language from *Kaiser Foundation Hospitals* regarding the Congressional admonition against undue proliferation of bargaining units in the health care industry. However, the basis for the admonition was "Congress' concern that multiple bargaining units in healthcare could lead to increased strikes, jurisdictional disputes, and wage whipsawing that might disrupt the provision of health care." *Catholic Healthcare West*, 344 NLRB No. 93, Slip. Op. at 3 (citing *Manor Healthcare Corp.*, 285 NLRB 224 (1987)). If a single facility unit will threaten the kinds of disruptions to continuity of patient care that Congress sought to prevent, the Board has found that the single facility presumption can be rebutted. See *Cf. West Jersey Health System*, 293 NLRB 749, 751 (1989) (determining that a labor disruption at a petitioned-for single facility unit could adversely affect health care at other facilities, as certain equipment was only available in

some facilities and, in some instances, the employees who operated the equipment rotated from facility to facility, and all hot food served to patients and employees was prepared in one facility).

Here, given that the Pinnacle facilities are stand alone operations, it is difficult to see how disruption at one Pinnacle facility would adversely affect the provision of health care at another facility should a labor dispute arise. Tellingly, I note that the Employer's Administrator testified that no adverse impact would likely result in the event of a shutdown of the Employer's Facility on the other Pinnacle facilities or vice versa. Interestingly, the Board has stated, "[O]ften the broader unit will increase the danger that a work stoppage will have an adverse impact on the delivery of health care services in a relevant geographical area--a result Congress could not have intended." *Catholic Healthcare West*, 344 NLRB No. 93, Slip. Op. at 3 (citing *Manor Healthcare Corp.*, 285 NLRB 224, 226 (1987)).

#### **d) Absence of Bargaining History**

There exists no history of bargaining at the Employer's Facility. The absence of a bargaining history weighs in favor of the single facility presumption where, as here, no union seeks to represent the employees on a broader basis. See *New Britain Transportation Co.*, 330 NLRB 397.

#### **e) Geographic Proximity**

The Employer's Facility is about 74 miles away from the nearest facility (Corvallis) in Pinnacle's smallest proposed unit. Thus, the factor of geographic proximity does not support the Employer's proposed multi-facility unit. Rather it supports the presumption that the Facility is an appropriate unit in the circumstances of this case.

Two recent Board decisions finding single facility units inappropriate, in part because of close geographic proximity, are distinguishable. In *Jerry's Chevrolet, Cadillac, Inc.*, 344 NLRB No. 87 (2005), the Board held that the employer rebutted the single facility presumption because of the four car dealerships' "extremely close proximity to one another" (within a few feet of one another and without any fences or barriers), which allowed for the shared use of the parts facility, car wash, collision center, new car drop-off location, etc. In *St. Luke's Health System, Inc.*, 340 NLRB No. 139 (2003), cited by the Employer, 11 of the 21 clinics at issue were less than a 10-minute drive from each other within the Sioux City metropolitan area, and the remaining clinics were located between 15 and 55 miles from downtown Sioux City. The Board further found that the clinics' close geographic proximity facilitated actual permanent and temporary transfers, joint meetings, education and training programs. *Id.*

In both *Jerry's Chevrolet* and *St. Luke's Health System*, the Board also found significant functional integration and lack of local autonomy because the employers had a heavily centralized hiring and disciplinary system. See also *Stormont-Vail Healthcare*, 340 NLRB No. 143 (holding that a multifacility unit comprised of a main campus, outlying clinics, and community nursing centers, was appropriate based on evidence of interchange, shared use of the cafeteria and fitness center, functional integration and close proximity (6 blocks to 70 miles)).<sup>27</sup> As discussed above, there is significant local autonomy and lack of functional integration, interchange and interaction between the Pinnacle facilities.<sup>28</sup>

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<sup>27</sup> In *Stormont Vail Healthcare, Inc.*, the parties initially stipulated to include multiple facilities in a unit but also disputed whether additional facilities should also be included. Thus, that case did not involve the single facility presumption, as is the case here. Rather, the Board in *Stormont* found the unit, stipulated to by the parties, to be arbitrary as it included clinics or operations that were farther away from

I also note that the Board has found that close geographic proximity does not conclusively warrant a finding against the presumption in favor of a single facility unit. In *AVI Foodsystems*, 328 NLRB 426 (1999), the Board found appropriate a single facility unit of cafeteria workers located on the employer's campus, excluding cafeteria workers at a restaurant on the same campus, observing that "each operation [was] located in a separate building with a significant degree of autonomy." *Id.* at 429; see also e.g., *Gordon Mills*, 145 NLRB 771 (1963) (finding single facility unit of production employees appropriate, excluding similar employees located 500 feet away in a separate building, given local autonomy and a lack of interchange and bargaining history). Similarly, the significant geographic distance from the Employer's Facility to other regional facilities carries weight because the regional employees work for separate facilities, are housed in separate buildings, under separate supervisors, and without regular interchange or interaction with one another.

#### **4. Conclusion**

In sum, an examination of the record reveals that there is insufficient evidence to find that any relevant and material factor favors rebutting the single facility presumption. Indeed, the evidence of substantial autonomy, lack of interchange and significant geographic separation, strongly favors support for Petitioner's unit. Accordingly, I find that the Employer has not rebutted the single facility presumption and that Petitioner seeks an appropriate unit.

### **B. THE MULTIEmployer ISSUE**

#### **1. Parties' Positions**

The Petitioner seeks to represent only those employees employed solely by the Employer. The Employer contends that the only appropriate unit must include not only the petitioned for employees employed by the Employer but also temporary employees employed jointly by both the Employer and five (5) staffing agencies. The Employer further argues that because the number of jointly employed employees exceeds the number of employees solely employed by the Employer, Petitioner's proposed unit does not constitute a substantial and representative complement. The Employer further contends that excluding the jointly employed employees from the unit would undermine effective bargaining. Finally, the Employer contends

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the main campus (70 miles) than the most geographically distant outlying clinic (60 miles from the main campus), which Petitioner sought to exclude from the unit. Notwithstanding these distances, the Board ultimately found a broader multi-facility unit appropriate based in part on evidence of interchange between the various clinics and departments included in the broader unit found appropriate by the Board. In light of the facts involved, I find *Stormont-Vail Healthcare* is inapposite here.

<sup>28</sup> The facts in *Frito-Lay, Inc.*, 202 NLRB 1011 (1973) relied on by the Employer for the proposition that the Board has found distant facilities an appropriate unit, are significantly different in two primary respects. First, the petitioned for unit was, again, not a single unit. Petitioner sought to represent a unit of route salesmen in three Districts in Region 2 while the employer asserted all Districts in Region 2 was the only appropriate unit. Second, the Board, in agreeing with the employer that an all Region unit was appropriate, found little or no local authority with the District Sales Manager. In fact, the Regional Sales Manager, not the District Sales Manager, recruited, screened, hired, disciplined, and evaluated employees. The District Sales Manager simply aided in training, building displays, and covering routes. The District Sales Manager had little or no authority over terms and conditions of employment. The Board also noted that even though there was no employee transfer, there was substantial product transfer and the District Sales Managers and Relief Salesmen were used Region wide.

that because it is not known whether the joint employers consent to the joint employer unit, the petition must be dismissed.

## **2. The Evidence**

The record reveals that approximately forty nine (49) employees have been employed jointly by the Employer and five staffing agencies, including Pro-Staffing LLC; Health Care Services; North Valley; Parkway and InteliStaf. On occasion, CNAs employed jointly by the Employer and a staffing agency comprise the entire complement of CNAs at the facility, particularly on evening shifts. On other occasions, jointly employed employees work side by side with unit employees employed solely by the Employer. While employed at the Employer's locations, the jointly employed employees perform the same services as their counterparts who are solely employed by the Employer.

The Employer has no role in hiring or firing the jointly employed individuals. The respective agency decides whom to send to fulfill a request by the Employer, which nevertheless retains the right to reject a dispatched employee. While employed at the Employer, agency employees are supervised by supervisors of the Employer. Personnel matters relating to the agency employees are handled by the respective agency.

## **3. Legal Analysis Regarding the Multiemployer Issue**

### **a) The Appropriateness of the Petitioner's Proposed Unit**

As explained below, I find that Petitioner's proposed unit is an appropriate unit and that the jointly employed employees must be excluded from the unit.

### **b) The Employer's Arguments That the Petitioner's Proposed Unit Is Not Appropriate**

The Employer is urging me to approve the kind of multiemployer unit, composed of solely and jointly employed employees, that was addressed by the Board's ruling in *Oakwood Care Center*, 343 NLRB No. 76, slip op. at 5 (2004). The Employer argues that, because the employees in the Petitioner's proposed unit and the supplied temporaries possess a strong community of interest, the Petitioner's proposed unit is not an appropriate unit unless the temporary employees are included.

In *Oakwood* the Board overruled *M.B. Sturgis*, 331 NLRB 1298 (2000), and decided to return to the precedent established in *Greenhoot, Inc.*, 205 NLRB 250 (1973) and *Lee Hospital*, 300 NLRB 947 (1990). Thus, in *Oakwood*, the Board held that solely employed employees of an employer and jointly employed employees of the employer and a temporary employment agency are employees of different employers and the inclusion of these two groups of employees in the same unit creates a multiemployer unit. *Id.* at 4. The Board also explained that, because combined units of solely and jointly employed employees are multiemployer units, these units "are statutorily permissible only with the parties' consent." *Id.* Because two of the parties in the *Oakwood* case, namely the two employers, had not consented to the petitioned for multiemployer unit, the Board dismissed the petition.

I note that the Board in *Oakwood* used the phrase "parties' consent" rather than employers' consent. Accordingly, I conclude that there is no basis for determining that the Board in *Oakwood* meant to use the phrase employers' consent and did not really intend to use the phrase parties' consent. Thus, the plain meaning of the words used by the Board in *Oakwood* establishes that all parties must consent to the establishment of a multiemployer unit, and that the phrase all parties includes unions as well as employers.

The necessity of having the union's consent is not only established by the plain meaning of the Board's reasoning in *Oakwood*, it is also mandated by the wording of the decision as a whole. In explaining its rationale, the Board first noted that "the text of the Act reflects that Congress has not authorized the Board to direct elections in units encompassing the employees of more than one employer." *Id.* at 3. The Board then acknowledged that the Board and courts have long upheld voluntarily established multiemployer bargaining, when all parties had consented to that arrangement. *Id.* at 4. The Board also noted in *Oakwood* that even the holding in *Sturgis* acknowledged that all party consent was needed for multiemployer units, and that the Board in *Sturgis* erred by concluding that units composed of employees of a single employer and employees of a joint employer are not a multiemployer unit. *Id.* Thus, the decision as a whole in *Oakwood* supports the conclusion that the Board was affirming the need for an all party agreement for the creation of a multiemployer unit. In this case, the record shows that the Petitioner has not consented to this arrangement. Therefore, because not all parties have given their consent, there is no legal basis for imposing the multiemployer unit proposed by the Employer.

The Employer also argues, because the Employer's employees share an overwhelming community of interest with the jointly employed employees, the unit sought by Petitioner is not an appropriate unit and that the smallest appropriate unit is the combined unit sought by the Employer. In this regard the Employer relies on *Outokumpu Copper Franklin, Inc.*, 334 NLRB No. 39 (2001). In *Outokumpu Copper*, as in this case, the petitioning union sought a unit limited to the employer's own employees, and the employer argued that the smallest appropriate unit was a unit comprised of the employer's solely employed employees and its jointly employed employees who were supplied by a temporary employment agency. The Board in *Outokumpu Copper* expressly stated that, as provided for in *Sturgis*, it was assessing the appropriateness of the proposed units based on a community of interest test, and it concluded that the community of interest evidence established that the employer's solely employed and its jointly employed employees shared such a strong community of interest that a combined unit of those two groups was the smallest appropriate unit. *Outokumpu Copper Franklin, Inc.*, 334 NLRB at 263.

As noted above, in *Oakwood* the current Board overruled the decision in *Sturgis*, and a brief analysis of those two decisions readily shows that the now reversed holding in *Sturgis* was an essential component of the holding in *Outokumpu Copper* and thus of the Employer's argument in this case. In both *Oakwood* and in *Sturgis*, the Board acknowledged that pursuant to Section 9(b) of the Act, the appropriate unit shall be an "employer unit, craft unit, plant unit, or subdivision thereof." The Board then stated:

Of these permissible categories of units, the broadest is the "employer unit," with each of the other delineated types of appropriate units representing subgroups of the work force of an employer. Thus, the text of the Act reflects that Congress has not authorized the Board to direct elections in units encompassing the employees of more than one employer. *Id.* at 3.

As stated above, the Board in *Oakwood* was critical of and reversed the *Sturgis* Board's conclusion that a unit comprised of solely employed and jointly employed employees constituted a single employer unit that complied with the single employer mandate in Section 9(b) of the Act. Thus, under *Oakwood*, the combined unit found appropriate in *Outokumpu Copper* and the unit proposed by the Employer in this case are multiemployer units, and under Section 9(b) of the Act, the Board will not impose such units.<sup>29</sup>

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<sup>29</sup> I also note that in *Greenhoot*, which was re-affirmed by the Board in *Oakwood*, the Board rejected the proposed multiemployer unit, but the union was given the option of proceeding in elections in the various single employer units. See *Greenhoot*, 205 NLRB at 251.

#### **4. Conclusion**

In sum, I conclude that the Petitioner's proposed single employer unit is an appropriate unit, despite the community of interest that the Employer's solely employed employees share with its jointly employed employees. I further conclude that the Employer's proposed multiemployer unit is not an appropriate unit pursuant to Section 9(b) of the Act and the Board's holding in *Oakwood*. Accordingly, the Employer's arguments about fragmentation and lack of representative complement must also fail.

#### **C. CONFLICT OF INTEREST ISSUE**

##### **1. Parties' Positions**

The Employer argues that the petition should be dismissed because there is an inherent conflict of interest as Petitioner currently represents surveyors and specialists employed by the State of Oregon and is seeking to represent a unit of employees who have been or probably could be the subject of LTC compliance surveys conducted by the surveyors or investigations conducted by specialists. More to the point, surveyors and specialists arguably may not properly perform their public duties out of loyalty to their union brethren. Petitioner argues that there is no substantiated conflict of interest that would warrant the dismissal of its petition.

##### **2. Evidence**

The record reveals that, in addition to seeking to represent the employees in the petitioned for unit, Petitioner also currently represents client care surveyors (hereinafter "surveyors") who are employed by Senior Persons Disability Services, the Client Care Monitoring Unit (hereinafter "CCMU"), within the State of Oregon's Department of Health and Human Services. The surveyors, in the normal course of their work, periodically come into contact with the Employer's Facility as well as other Oregon facilities providing services in long-term care (hereinafter "LTC"). In particular, the surveyors determine "compliance with State licensing and Federal certification requirements during periodic fact-finding surveys of long-term care facilities to insure continued high quality nursing care and services."<sup>30</sup> In carrying out these duties and responsibilities, the surveyors actually visit LTC facilities where they are able to observe, interview individuals,<sup>31</sup> and/or review Employer documents, records systems, policies and/or procedures in effect at the facility.<sup>32</sup> In sum, the surveyors periodically determine whether the Facility is in substantial compliance with applicable regulations.<sup>33</sup>

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<sup>30</sup> See Union Exhibit 1 (surveyor job description). Petitioner also submitted a job description (Union Exhibit 2) concerning an "adult protective service specialist" (hereinafter "specialist") which is also apparently included along with the surveyors, in a unit of State employees represented by Petitioner. I note that Union Exhibit 2 indicates that the specialist engages in functions similar to the surveyor, only the specialist's responsibility appears to more narrowly focus on investigating and remedying instances of adult abuse or neglect in nursing care or LTC facilities similar to the Employer's. Like the surveyors, the specialists in the performance of their public duties, would appear to be in a position to impact the Employer's facility in significant ways.

<sup>31</sup> In particular, surveyors may interview employees, residents, and/or family members of residents. Specialists also utilize similar techniques in performing their duties.

<sup>32</sup> The review of records and observation of the LTC facility's operations, employees and systems is rather extensive and includes such things as observing resident care, other employees who are not

After conducting the survey, the surveyors return to their office and prepare a report on the complaint or annual survey and issue the report, which contains reference to evidence supporting the surveyor's determinations. If the surveyor determines that the LTC facility is not in compliance, the surveyor may utilize a range of actions in correcting non-compliance. Such actions range from issuing a simple citation ("red tagging") and levying fines, to determining that a facility is in "immediate jeopardy," which could result in further serious actions up to and including the effective shutdown of the facility and/or the removal of residents from the facility. Further, a surveyor is able to initiate proceedings to decertify a LTC facility under the Medicaid/Medicare program and a surveyor's determination could impact continued employment by an employer of its employees, if the determination finds wrongdoing by an employee. However, these adverse actions by the surveyors appear subject to review by CCMU and to further review by the State and the courts.<sup>34</sup> In this regard, Rhoades testified that in her 18 years in this industry, her involvement in such reviews/appeals was limited to only one instance, from which she was neither familiar with the extent and nature of review that occurred nor familiar with any eventual adverse actions taken following the review/appeal.<sup>35</sup> However, Rhoades is aware that this one review/appeal did result in a reversal of a portion of the surveyor's adverse actions and that the eventual adverse action did not result in a closure of the facility and/or a restriction on admitting additional residents. Further, Rhoades testified that she has no reason to believe that the surveyors have engaged in any misconduct with respect to performing their public duties in the survey of LTC facilities.

Rhoades also testified concerning the impact of an adverse determination by CCMU on LTC facility employees. In particular, Rhoades recalled an instance when she was employed by another employer as an administrator. There, a surveyor had determined that the employer had failed to monitor bath water temperatures for residents. In that instance, the surveyor remained at the inspected facility until new regulators could be installed on the hot water heaters to limit the temperature to an acceptable level. However, the employer did not receive a red tag or citation from the surveyor, who also did not recommend that any adverse action be taken against the maintenance employee. Regardless, the maintenance employee did receive employer discipline for failing to adhere to his job responsibility of maintaining the temperature of hot water within a designated range.

Rhoades also testified regarding the likely or possible impact of a State determination of wrongdoing and/or abuse by a nurse (LPN, CNA, etc.). In such an

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directly involved in such care (e.g., cooks, maintenance, housekeepers, etc.), and inspecting the facility property including resident care areas, bedrooms, bathrooms, dining areas, kitchen facilities, etc.

<sup>33</sup> The record reveals that the surveyors conduct either complaint or annual surveys. The former surveys could last 1 to 3 days, while the latter last about 5 days. If a complaint arises in close proximity to the annual survey, a complaint survey could be combined with the annual survey. Rhoades estimated that the Employer has been subject to about five to seven complaint surveys over the past year. Rhoades further estimated that the complaint surveys lasted about 2 days. Rhoades did not elaborate on the frequency or nature of any actual visits to the Facility by specialists.

<sup>34</sup> In particular, according to Union Exhibit 1, the surveyor's "work is reviewed for accuracy, timeliness, and conformance to Federal and State standards, and division policies and procedures. The employee is guided by Federal and State statutes, regulations, rules, professional standards, and agency and unit policies and procedures." Similarly, the specialist's work is also subject to review by State officials.

<sup>35</sup> In the one review/appeal, the surveyor who took the adverse action against Rhoades' facility was present and participated in the proceeding, which appeared to be an informal meeting between the State and facility to review the surveyor's determination of compliance.

instance, CCMU would notify the "Board of Nursing" about the nurse's conduct. The Board of Nursing could then conduct its own independent investigation. Such CCMU determinations and/or Board of Nursing investigations could result in the nurse being suspended by the Employer pending a full investigation and eventually in termination. Indeed, Rhoades testified that a surveyor could, during a survey, determine that an employee of the Employer be immediately removed from the Facility and Rhoades would follow that determination, again, pending an investigation into the conduct that prompted the determination. Rhoades also testified about being approached by a surveyor, during an actual survey, and being advised that Rhoades should approach an employee about the need to properly follow a standard policy.<sup>36</sup>

### **3. Legal Analysis of Conflict of Interest Issue**

While arguably there is a potential for such conflicts to occur, I do not view such conflicts as inevitable. It is well settled that a union may not represent the employees of an employer if a conflict of interest exists on the part of the union such that good-faith collective bargaining between the union and the employer could be jeopardized. *Bausch & Lomb Optical*, 108 NLRB 1555 (1954). In order to find that a union has a disabling conflict of interest, the Board requires a showing of a "clear and present" danger interfering with the bargaining process. The burden on the party seeking to prove this is a heavy one. *Garrison Nursing Home*, 293 NLRB 122 (1989), citing *Quality Inn Waikiki*, 272 NLRB 1, 6 (1984), enf. 783 F.2d 1444 (9th Cir. 1986); *Alanis Airport Services*, 316 NLRB 1233 (1995).

At this time, any alleged conflict of interest in this case is speculative and does not present a "clear and present" danger. Indeed, Rhoades testified that she is aware of no misconduct by a surveyor in Rhoades' 18 years as an administrator of LTC facilities in Oregon. Moreover, the record demonstrates that there are built in procedures, policies and other avenues to insure or review that the surveyors and specialists properly perform their public duties and on the off-chance that such performance does not occur, the Employer may seek review and/or an appeal of a surveyor's or specialist's adverse determination. See *Guardian Armored Assets, LLC*, 337 NLRB 556 (2002).

In this regard, I also note that the Board has long held that the mere fact that inspectors, quality assurance/control employees and similar classifications are responsible for the quality of the items manufactured, does not warrant their exclusion from a unit of general plant employees. See *Metal Textile Corp.*, 88 NLRB 1326, 1329 (1950); *Chase Aircraft Co., Inc.*, 91 NLRB 288, 291 (1950); *American Service Bureau*, 105 NLRB 485 (1953); *Blue Grass Industries*, 287 NLRB 274 (1987) (quality control employees are generally included in production and maintenance units based on traditional community of interest standards). The responsibilities of the surveyors here contain some of the characteristics of inspectors and quality control employees.

### **4. Conclusion**

In light of the above, the record evidence and the parties' respective briefs and arguments, I find that the Employer has failed to carry its burden of showing a "clear and present" danger interfering with the bargaining process as it relates to Petitioner's representation of the unit of State employees and to the unit it seeks in this matter. Accordingly, I find no conflict of interest warranting dismissal of the instant petition.

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<sup>36</sup> Rhoades could not recall the specific standard policy raised by the surveyor in this actual survey.

## **D. DUE PROCESS ISSUE**

### **1. Parties' Positions**

The Employer claims that it was denied administrative due process and the opportunity to fully present its case in this matter when its request for a 1-week extension of time to commence the pre-election hearing was denied. Petitioner claims that there has been no denial of due process and the Employer is essentially seeking an unnecessary delay in these proceedings.

### **2. Evidence**

The Employer requested the extension because Pinnacle's Director of Human Resources, John Kostenbauer, was "out of State" on a "vacation and unreachable" during a 2-week period that included the week before and the week of the hearing.

In its brief, the Employer acknowledges that the Region, after rejecting the Employer's pre-hearing request for a 1-week continuance, offered to reschedule the commencement of the hearing in this case from November 21 to November 23.<sup>37</sup> However, the Employer's labor attorney countered and requested that the hearing commence on November 22. The Region granted the labor attorney's counter-request to commence the hearing on November 22.

At the outset of the hearing on November 22, the Employer renewed its request for a 1-week continuance for the commencement of the hearing due to Kostenbauer's absence. Petitioner objected at the hearing to the request, claiming that "somebody is on site and engaging in HR functions inasmuch as since shortly after the petition was filed the Employer has been conducting a campaign and committing unfair labor practices." Petitioner further argued that notwithstanding its filing of unfair labor practice charges against the Employer, it had requested to proceed with the hearing in this case.

The Hearing Officer denied the request for the 1-week delay to commence the hearing and stated that the Employer was promptly and timely notified of the filing of the instant petition and the initial hearing date in this matter.<sup>38</sup> Further, the Hearing Officer stated:

So I am going to deny the continuance at this point. If at some point in the hearing and it becomes appropriate or if you wish to renew your request based on something in the hearing, you are welcome to do so. Okay?

The Employer's labor attorney responded: "I don't think I have exception to your ruling but if I do I just did so that I preserve my argument."

Shortly before noon during the second day of hearing, the Employer requested a short break immediately following the conclusion of Rhoades' testimony. Upon resumption of the hearing, the Employer's labor attorney, who had initially been present throughout the hearing, had left the hearing and had been replaced by a new attorney who is co-counsel from the same law firm.

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<sup>37</sup> All dates are in 2005 unless otherwise noted.

<sup>38</sup> Those dates were November 10 and/or 11 as noted in the Employer's brief.

After the resumption of the hearing, the Hearing Officer asked the Employer's new attorney, "[D]o you have any further testimony on behalf of the Employer?" The new attorney replied, "No."

Thus, the record reveals that the Employer rested its case at the hearing, voluntarily opting not to present additional witnesses, documents and/or any other evidence. Further, the Employer at no point following the Hearing Officer's conditional ruling at the outset of the hearing, made any further request of the Hearing Officer to continue the hearing. Indeed, it clearly appeared that the Employer was satisfied with the record it had made through the testimony provided by Rhoades and thus rested.

Moreover, at no time during the hearing did the Employer submit an offer of proof regarding the testimony and/or documents that Kostenbauer would provide during the hearing. Further, the Employer failed to state at the hearing and/or in its brief why other Pinnacle witnesses such as Regional Administrator Lee Garber, could not either individually or collectively testify regarding the substantive issues in this matter. Indeed, the Employer alleges that Garber oversees the six facilities that make up the regional-wide unit, which the Employer argues is appropriate in this case. In particular, the Employer asserts that Garber maintains close and daily contact with the Employer's Facility and consults daily with Rhoades over such issues including the limited areas of supervision (discharge, adjusting shift times, filling staffing needs, and/or deviating from standard Pinnacle pay raises) over which Ms. Rhoades must "consult" with Garber and/or Kostenbauer.

Despite the foregoing, the Employer did not submit its new request for an "additional day of hearing" until it submitted its brief in this matter.<sup>39</sup>

### **3. Legal Analysis of Due Process Issue**

The Employer claims that it was denied administrative due process because the commencement of the hearing was not rescheduled to accommodate the Employer's desire to present evidence at the hearing through Kostenbauer.

In *Croft Metals, Inc.*, 337 NLRB 688 (2002), the Board held that parties in representation cases must receive notice of hearing not less than 5 days prior to the hearing, excluding intervening weekends and holidays. In that case, the Board further held that "[b]y providing the parties with at least 5 working days' notice, we make certain that parties to representation cases avoid the Hobson's choice of either proceeding unprepared on short notice or refusing to proceed at all."

Here, the Employer received more than the minimum notice of hearing required by *Croft Metal*. Further, while the Employer did not receive the 1-week extension it had initially requested for the commencement of the hearing, it was granted its alternative request to commence the hearing on November 22 rather than on November 21 or 23 as proposed by the Region. Moreover, I note that Petitioner strenuously objected to any rescheduling of the hearing

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<sup>39</sup> I further note that rather than raising such at the hearing, the Employer's brief details for the first time, a sequence of events surrounding contacts between the Employer, its labor attorney, and/or the Region in connection with the filing of the instant petition, the notice of hearing, the Employer's request for a 1-week delay in commencing the hearing, and the Employer's labor attorney's learning of Kostenbauer's vacation.

in this matter arguing that such would harm its interests and employees' right to a prompt resolution of the representation issues in this case.

The Employer also failed to request of the Hearing Officer, pursuant to her conditional ruling, that the hearing be continued to another day and/or failed to make an offer of proof regarding "unusual circumstances" that would warrant continuing the hearing to another day. In particular, the Employer failed to make an offer of proof as to the unusual circumstances surrounding its desire to present evidence only through Kostenbauer rather than through other Pinnacle witnesses who, either individually or collectively, appear to have been in a position to know and address the substantive issues in this case. Moreover, the Employer failed to make an offer of proof regarding whether only through Kostenbauer, it could have adduced any relevant newly discovered and previously unavailable evidence in connection with its new request for an additional day of hearing.

Under the circumstances of this case, I find that the Employer's claim of a denial of administrative due process is without merit. In this regard, I am mindful of the discretion and decision-making authority delegated to me by the Board under Section 3(b) of the Act. In particular, I have weighed any prejudice to the Employer by proceeding with the already delayed commencement of the hearing, albeit short of its 1-week extension request, with the countervailing desires of the Petitioner and of employees for a quick resolution of the issues involved in this case.

I further note that the Employer's denial of due process claim centers on the Region's denial of a request for a 1-week extension of time to commence the hearing. Yet, the Employer did not submit any request to the hearing officer to continue the hearing following her conditional ruling against further delaying the commencement of the hearing. Rather, the Employer tardily waited until submitting its brief to request an additional day of hearing during which to present evidence through Kostenbauer.

#### **4. Conclusion**

In light of the above and the record as a whole, I find that the Employer's claim of a denial of administrative due process lacks merit as the Employer received more than the minimum notice of hearing. Further, the Employer failed to timely request an additional day of hearing and also failed at the hearing in this case and in its brief to submit an offer of proof regarding any relevant newly discovered and previously unavailable evidence or any special circumstances that would warrant re-opening the hearing. Finally, balancing the parties' competing interests warranted the denial of the Employer's request to delay the commencement of the hearing beyond the delay that had already been granted and to re-open the record for an additional day of hearing.

### **III. CONCLUSION**

In light of my findings above and the record as a whole, I shall direct an election in the following appropriate unit (hereinafter "Unit"):

All full-time, regular part-time and per diem employees, certified nursing assistants, nursing assistants, certified med aids, physical therapy aids, all dietary, housekeeping, laundry, and maintenance employees, employed at the Employer's facility located at 3011 NE 28<sup>th</sup> Street, Lincoln City, Oregon; excluding all employees jointly employed by the Employer and other

employers and/or staffing agencies, confidential employees, managers, licensed practical nurses, registered nurses, licensed physical therapy assistants, office manager, resident care managers, charge nurses, rehabilitation department manager, food service director, environmental services director, housekeeping supervisor, medical records director, social services director, activities director, all other professional employees, guards and supervisors as defined in the Act.

There are approximately 30 employees in the Unit.

#### **IV. DIRECTION OF ELECTION**

An election by secret ballot shall be conducted by the undersigned among the employees in the Unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the Unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by Service Employees International Union, Local 503.

##### **A. List of Voters**

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that an election eligibility list, containing the alphabetized full names and addresses of all the eligible voters, must be filed by the Employer with the Officer-in-Charge for Sub-Region 36 within 7 days of the date of this Decision and Direction of Election. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. The Sub-Region shall, in turn, make the list available to all parties to the election.

In order to be timely filed, such list must be received in the Sub-Regional Office, 601 SW 2<sup>nd</sup> Avenue, Suite 1910, Portland, OR, 97204-3170, on or before December 12, 2005. No extension of time to file this list may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the filing of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission to (503) 326-5387. Since the list is to be made available to all parties to the election, please furnish a total of 4 copies, unless the list is submitted by facsimile, in which case only one copy need be submitted.

## **B. Notice Posting Obligations**

According to Board Rules and Regulations, Section 103.20, Notices of Election must be posted in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of election. Failure to follow the posting requirement may result in additional litigation should proper objections to the election be filed. Section 103.20(c) of the Board's Rules and Regulations requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

## **C. Right to Request Review**

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by December 19, 2005. The request may **not** be filed by facsimile.

In the Regional Office's initial correspondence, the parties were advised that the National Labor Relations Board has expanded the list of permissible documents that may be electronically filed with the Board in Washington, D.C. If a party wishes to file one of these documents electronically, please refer to the Attachment supplied with the Regional Office's initial correspondence for guidance in doing so. The guidance can also be found under "E-Gov" on the National Labor Relations Board web site: [www.nlrb.gov](http://www.nlrb.gov).

**DATED** at Seattle, Washington, this 5<sup>th</sup> day of December, 2005.

/s/ Richard L. Ahearn  
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